STATE OF MICHIGAN

COURT OF APPEALS

MARIE L. CYMBALSKI,

Plaintiff-Appellee,

v

ANTHONY CYMBALSKI,

Defendant-Appellant.

UNPUBLISHED
October 1, 1999

No. 218867
Sanilac Circuit Court
LC No. 98-025668 DO

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from a post-divorce property distribution in which the trial court divided the majority of the parties' assets equally between the parties. We affirm.

Defendant's principal claim on appeal is that the trial court erred by refusing to specifically enforce a prenuptial agreement signed by the parties in 1966. Defendant argues that although the agreement, on its face, applied only to a property distribution occurring after the death of one of the parties, the court should nonetheless have applied the agreement to the present divorce settlement because (1) the agreement makes clear that the parties did not want the marriage to affect their rights to their individual property, and (2) the only reason the agreement did not mention divorce is because mentioning divorce in a prenuptial agreement in 1966 would have made the agreement void as against public policy. Whether a prenuptial agreement that does not expressly contemplate divorce should govern a post-divorce property distribution is a question of law. This Court reviews questions of law de novo. *Faircloth v Family Independence Agency*, 232 Mich App 391, 401; 591 NW2d 314 (1998).

The Michigan Supreme Court dealt with a similar problem similar in *Scherba v Scherba*, 340 Mich 228; 65 NW2d 758 (1954), where the parties signed a prenuptial agreement contemplating death. *Id.* at 230. The trial court evidently used the agreement as a guide to achieve a fair property settlement upon the parties' divorce. *Id*. at 231. While acknowledging that a prenuptial agreement contemplating divorce would have been invalid as contrary to public policy, our Supreme Court stated:

> That the trial court may have viewed the agreement of [the] parties as to what provision should be made for defendant in the event the marriage were terminated by

> plaintiff's death as some sort of guide as to what would be a just and equitable provision for her when the marriage was terminated by plaintiff's cruelty does not seem to us necessarily amiss. [*Id.*]

Here, relying on *Scherba*, the trial court held that "while the antenuptial agreement in question is not binding upon this Court for purposes of property settlement, it may be reviewed by this Court, together with all other evidence, in considering the factors that the Court must consider in dividing property . . . ." We disagree with defendant's contention that this holding was erroneous, given the factual similarity between the instant case and *Scherba*.

Defendant contends that *Scherba* is not directly applicable here because it was decided prior to 1991, when prenuptial agreements contemplating divorce first became enforceable in this state under *Rinvelt v Rinvelt*, 190 Mich App 372, 379-382; 475 NW2d 478 (1991). Defendant says that because prenuptial agreements contemplating divorce are now enforceable, a prenuptial agreement that contemplates death, that clearly expresses the parties' desire to keep their individual property separate, and that was drafted prior to the *Rinvelt* decision should be enforced in a divorce context because the only reason divorce would not have been mentioned in such an agreement would have been the prohibition against mentioning it. This argument is without merit. That plaintiff agreed to sign a prenuptial agreement contemplating death[1] does not necessarily mean that she wished such an agreement to govern in the event of a divorce, especially since no-fault divorce was unavailable in 1966, the year the agreement was signed. See the historical note to MCL 552.6; MSA 25.86. Plaintiff may have concluded, for example, that if the marriage dissolved due to defendant's misconduct, she should receive a portion of the individual assets defendant owned prior to the marriage. It would be unfair to specifically enforce this agreement in the context of a divorce property settlement in the absence of any testimony that the parties wanted the agreement to cover divorce but did not draft it as such because of the prevailing law at the time. Because the record contains no testimonial or documentary evidence that the parties intended the agreement to cover a divorce property distribution, the trial court did not err by refusing to enforce the agreement.

Instead, the trial court acted in accordance with *Scherba, supra* at 231, by stating that it would not specifically enforce the prenuptial agreement, but would review it and use it as a factor in making an equitable distribution of property. Defendant argues that the trial court erred in this respect and contends that if the court did not specifically enforce the agreement, it should at the very least have used the agreement as a "guide" to the property distribution, because the *Scherba* court referred to using the agreement as a "guide." *Id.* We reject this argument as we regard this as a semantic distinction without a difference. Indeed, the trial court's ultimate disposition of the property – in which it awarded plaintiff her individual inheritance and the parties their individual bonds – shows that the court relied quite heavily on the prenuptial agreement, effectively using it as a "guide" under *Scherba*. Therefore, defendant's argument that the trial court did not act in accordance with *Scherba* is without merit.

Defendant also contends the court erred by finding that most of the marital assets were commingled and should be treated as joint property. This Court reviews a trial court's findings of fact in a divorce action for clear error. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). We conclude that the court's finding regarding the commingled assets was not clearly erroneous. In light of

the trial court's proper finding that the couple's property – aside from plaintiff's inheritance and the parties' separate bonds – had been commingled, and in light of its unchallenged, implicit finding that the traditional property distribution factors were equal between the parties, the court's ultimate fifty/fifty distribution of the majority of the parties' assets was not inequitable. See *Sands, supra* at 34.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] While the preamble to the agreement makes a general statement of the parties' intent to not let the marriage affect their rights to their separate property, the actual agreement leaves out such language and deals with how the property should be distributed upon the death of either party.